Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

TERRY COLEY,

Petitioner,

v.

HARLEY G. LAPPIN and
WARREN DAVID JUSTICE,

Respondents.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE FUGITIVE DISMISSAL RULE VIOLATE A DEFENDANT'S FIFTH, SIXTH, AND EIGHT AMENDMENT RIGHTS WHEN THE 2241 IS BARRED AS INSUFFICIENT TO OVERCOME THE INADEQUACY OF A 2255 REQUIREMENT AND THE DEFENDANT WAS A FUGITIVE DURING THE TIME A 2255 COULD HAVE BEEN TIMELY FILED?

LIST OF PARTIES

The parties in the court below are contained in the caption. There is no party with an interest to disclose pursuant to Rule 29 (6).

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PETITION FOR WRIT OF CERTIORARI

TERRY COLEY, by and through undersigned counsel, submits this Writ of Certiorari from the Fifth Circuit Court of Appeals opinion and requests review of the opinion filed on June 21, 2006. The opinion affirmed the decision in the United States District Court for the Eastern District of Texas, Civil Action No. 5:04-CV-108.

OPINION BELOW

The Fifth Circuit Court of Appeals filed an opinion on June 21, 2006 affirming the district court's decision. This unpublished opinion is reproduced in the Appendix at A-1.

JURISDICTION

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate, as the Fourth Circuit is believed to have entered a decision that is in conflict with the United States Constitution and precedent of the Supreme Court.

CONSTITUTIONAL AUTHORITY INVOLVED

FIFTH, SIXTH AND EIGHTH AMENDMENTS
[Reproduced in the Appendix hereto at A-11]

STATEMENT OF THE CASE

On August 5, 1988, Petitioner was among fifteen individuals named in a 19-Count Indictment, returned by the Grand Jury for the Northern District of Georgia. Of these nineteen Counts, Petitioner was specifically charged with the following: **Count One** - from a time unknown, but at least by March 5, 1995, and continuing until the date of the indictment, conspiracy to violate 21 U.S.C. § 841(a)(1) by intentionally and unlawfully possessing with the intent to distribute more than five kilograms of cocaine, all in violation of 21 U.S.C. § 846; **Count Five** - possession of cocaine on January 4, 1988, in violation of 21 U.S.C. §§ 841(a)(1) and 18 U.S.C. 2; **Count Six** - possession in excess of 500 grams of cocaine, on January 13, 1988, in violation of 21 U.S.C. §§ 841 (a)(1) and 18 U.S.C. 2; and **Count Twelve** - on or about May 30, 1988, utilizing the telephone to facilitate the carrying on of the possession of cocaine, in violation of 18 U.S.C. §§ 1952(a)(3) and (2).

Petitioner was arrested for the charged offenses on August 10, 1988, in the Southern District of Florida. Petitioner was subsequently arraigned on August 31, 1988, at which time he entered a plea of not guilty to all charges against him. The case was then bound over for jury trial.

On February 22, 1994, after a six-year span, Petitioner and two co-defendants finally appeared for the start of trial. On March 11, 1994, the jury found Petitioner guilty as to Counts One, Five, and Six of the Indictment. Petitioner was found not guilty of the charge in Count Twelve.

On May 26, 1994, Petitioner appeared for sentencing. After hearing arguments as to the relevant sentencing factors, the district court imposed a 188-month term of imprisonment. Petitioner was also assessed with a fine of $25,000.00. Petitioner, through counsel, appealed his convictions and sentence to the Eleventh Circuit. The Eleventh Circuit Court of Appeals affirmed the Appeal on March 28, 1997. Petitioner did not file a Petition for Certiorari, nor did he file a 2255, within the one-year time limitation due to the fact that he became a fugitive. Petitioner filed his 2255, on August 16, 2002, after consulting with counsel. Petitioner retained counsel for his 2255 on October 1, 2001. Post-conviction counsel uncovered a sentencing error and advised Petitioner to pursue a remedy with a 2255 or 2241 in order to avoid a miscarriage of justice and/or a violation of his Constitutional due process rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution.

On July 9, 2003, the United State District Court for the Northern District of Georgia (Atlanta Division) denied the 2255 Petition. The Certificate of Appealability (COA) was filed on August 26, 2003. The Certificate of Appealability was denied on October 6, 2003. The basis for the denial of the 2255 was a time bar for failure to timely file the 2255 and the exercise of due diligence in pursuing the question of law presented.

On May 17, 2004, Petitioner filed a Habeas Corpus Petition, pursuant 28 U.S.C. § 2241, asserting that the 2255 was inadequate and ineffective to protect Petitioner's due process rights, and that, as a fugitive, Petitioner could not have obtained the relevant

information to note the error made at sentencing. Additionally, Petitioner stated that he was not "in custody" and, therefore, a 2255 could not have been filed. On May 11, 2005, the United States Magistrate issued a Report of Recommendation (R&R) denying relief on the 2241. [A-6] Petitioner objected to the Magistrate's R&R on June 6, 2005. A District Court order adopting the Magistrate's R&R on the 2241, was filed in the United States District Court for the Eastern District of Texas on July 6, 2005. [A-3] The petition was dismissed with prejudice for lack of jurisdiction, however, the issues were dismissed without prejudice.

A timely Notice of Appeal was filed to address the 2241 Petition on August 2, 2005. The 2241 was denied by the Fifth Circuit Court of Appeals on June 21, 2006. [A-1]

STATEMENT OF FACTS

The facts of this case are taken from the Direct Appeal and 2255 briefs.

The charges against Petitioner were the result of an investigation into the drug-dealing activities of Clarence McIntyre (McIntyre). McIntyre was said to have been involved with the distribution of cocaine in the Northern District of Georgia. According to the investigative reports, McIntyre started distributing cocaine in the early 1980's with Milton Johnson. These two worked with, or employed, three other individuals. During the early stages of the distribution scheme, McIntyre and/or Johnson would utilize numerous suppliers in order to acquire their cocaine.

Petitioner and McIntyre knew one another through their respective sisters, both of whom went to college together. With Petitioner allegedly having difficulties with authorities in Birmingham, and given that McIntyre had dissolved his partnership with Johnson, Petitioner was offered a partnership in McIntyre's Atlanta operation. Petitioner accepted the offer. The supposed agreement was that (i) Petitioner would acquire the cocaine; (ii) McIntyre would distribute the cocaine; and (iii) both of them would provide half of the financing for the cocaine being bought. In fulfilling his part of the agreement, Petitioner was said to have arranged the acquisition of the cocaine in Miami, and the delivery to McIntyre's couriers.

On January 4th and 13th, 1988, Petitioner and McIntyre were involved with the sale of cocaine. Unfortunately for Petitioner, the sales were to undercover Agents who, through the wearing of wires, were able to tape the transactions as they occurred. Both Petitioner and McIntyre were arrested after the January 13th transaction.

Petitioner was sentenced on May 26, 1994. During this proceeding, Petitioner argued the following points: (i) drug quantity attributed to him; and (ii) the adjustment for the alleged aggravating role in the offense. As to the drug quantity, the district court found that there was sufficient showing that the amount of cocaine attributable to the conspiracy was between five and fifteen kilograms. [Sentencing Transcript: 39]. As to role in the offense, the district court did not find that the upward adjustment was warranted, but did not find that a departure may be

applicable for Petitioner's management of funds. [Sentencing Transcript: 49, 50].

After also determining that Petitioner did not obstruct justice, and that he was not worthy of a reduction for acceptance of responsibility, the district court did impose a 2-point upward departure for Petitioner's management of the funds associated with the conspiracy. [Sentencing Transcript: 66]. Having decided the relevant sentencing factors, the district court imposed a 188-month term of imprisonment upon Petitioner, with a fine in the amount of $25,000.00.

After the imposition of sentence, Petitioner was granted the benefits of (i) having his bond continued pending the appeal; and (ii) being allowed to self-surrender at the time and place so designated by the Bureau of Prisons.

The Petitioner, through counsel, went forward with an appeal of his conviction and sentence. The appeal raised three issues, to wit: (i) Whether Petitioner's case should have been dismissed for violation of the Speedy Trial Act, 18 U.S.C. 3161, *et. seq.*; (ii) Whether the Petitioner's case should have been dismissed for violation of his Sixth Amendment right to a speedy trial; and (iii) Whether the District Court erred in imposing a two-point upward departure in lieu of an aggravating role adjustment.

The Eleventh Circuit Court of Appeals affirmed the Petitioner's convictions and sentence on March 28, 1997. However, while the Petitioner subsequently received notice of the time and place of his self-surrender, he failed to appear for the execution of his

sentence. On April 2, 2001, Petitioner was re-arrested and incarcerated, pursuant to the original sentencing order of the district court.

On October 1, 2001, the Petitioner retained counsel to review and evaluate what he believed to be errors in his sentencing proceedings

A 2255 petition was filed as soon as the illegal sentencing issues were detected. The three issues raised on the 2255 petition were: (1) Whether the Petitioner's relevant conduct subjected him to a base offense level of thirty-four (34) when the finding of the District Court warranted only a level thirty-two (32) resulting in a complete miscarriage of justice; (2) The District Courts position on an upward departure to Petitioner's guideline range constituted an error as a matter of law, which resulted in the Petitioner being subjected to an illegal sentence; and (3) Counsel provided ineffective assistance of counsel in failing to address Issues one and two.

A 2255 was filed on or about August 15, 2002 in the United States District Court of the Northern District of Georgia, the location of jurisdiction of the conviction of Coley. The District Court's order of July 9, 2005 denied Coley relief as a result of a "time bar" for not having exercised diligence or having made an effort to discover the facts that underlie the basis for the issues presented, referring to his fugitive status as a factor in the time bar.[1]

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[1] Coley was a fugitive from approximately 1997 until he entered custody of the Federal Bureau of Prisons on April 2, 2001.

Coley's conviction was affirmed by the Court of Appeals on March 28, 1997. He was rearrested and incarcerated on April 2, 2001. The 2255 would have been due on March 28, 1998, or approximately ninety days later, due to the ninety-day tolling period if a defendant wishes to file a Petition for Certiorari. with the Supreme Court. *See* Kapral vs. United States 166 F.3d 565 (3rd Cir. 1999).

Due to the time bar of the 2255, a 2241 was filed on October 25, 2005 and set forth the following issues: (1) The district court finding that the drug quantity was between 5-15 kilograms of cocaine warranted a base offense level of Thirty-Two (32) - ***not*** the Level Thirty-Four (34), which was applied; (2) There existed a misapplication of the Sentencing Guidelines, resulting in Petitioner sentencing range, and ultimate sentence, to be higher than warranted, resulting in an illegal sentence and a miscarriage of justice; and (3) Petitioner's prior counsel was ineffective through (i) allowing the matter to go to trial; and (ii) failing to adequately represent Petitioner at sentencing and/or on appeal.

On May 1, 2005, the United States Magistrate issued a Report and Recommendation denying the § 2241 Petition. Petitioner filed Objections to the Magistrate's Report and Recommendation on June 6, 2005. A court order adopting the Magistrate's Report and Recommendation was issued on July 6, 2005. The § 2241 Petition was dismissed with prejudice for lack of jurisdiction, however, the issues were dismissed without prejudice. A timely Notice of Appeal was filed to address the § 2241 Petition on August 2, 2005. The

Fifth Circuit Court of Appeals denied the appeal on June 21, 2006. This Petition for Certiorari follows.

Under the jurisdiction of the Supreme Court of the United States, the Petitioner respectfully seeks review on Certiorari from the decision rendered by the Fifth Circuit Court of Appeals on June 6, 2006, denying Petitioner's request to be heard on the § 2241, as a result of a sentencing error that deprived the Petitioner of life and liberty, without due process of law.

Pursuant to Supreme Court Rule 10, jurisdiction in the Supreme Court is now appropriate as the Fifth and Eleventh Circuit Courts of Appeal are believed to have entered decisions that are in conflict with the United States Constitution and the purpose of a 2241 *habeas corpus* proceeding.

REASONS FOR GRANTING THE WRIT

A writ in this case should be granted, as this question represents a unique statement of Constitutional law as applied to the use of the *habeas corpus* petition, pursuant to 28 U.S.C. § 2241, in the absence of the ability, or adequacy of the § 2255 petition when a person has become a fugitive during the time frame when a § 2255 petition should have been filed. A 2241 petition is the same as the § 2255 petition and can take the place of a § 2255 when a Constitutional right may be violated, but for the opportunity to redress the matter in a court of law. It also avoids a miscarriage of justice. Though the Supreme Court has said fugitive status waives certain Constitutional rights, the question this Court needs to

address is if a § 2255 cannot be filed because a defendant is not in custody, and filing one when placed in custody results in a time bar, can a 2241 be used to correct a Constitutional error in light of the stated purpose of 2241 procedures? Essentially, does the fugitive dismissal rule bar a 2241 from being filed when the 2255 was time barred based on fugitive status.

When Petitioner was first sentenced, the district court made a sentencing error that deprived the Petitioner of his right to liberty.

ISSUE I

DOES THE FUGITIVE DISMISSAL RULE VIOLATE A DEFENDANT'S FIFTH, SIXTH, AND EIGHT AMENDMENT RIGHTS WHEN THE 2241 IS BARRED AS INSUFFICIENT TO OVERCOME THE INADEQUACY OF A 2255 REQUIREMENT AND THE DEFENDANT WAS A FUGITIVE DURING THE TIME A 2255 COULD HAVE BEEN TIMELY FILED?

As previously stated, Petitioner was a fugitive from approximately 1997 until his re-arrest on April 2, 2001. Petitioner's conviction was affirmed in the Eleventh Circuit Court of Appeals on March 28, 1997. Technically, Petitioner had one-year and ninety days in which to file a § 2255 petition. Any § 2255 would have been due on, or about, June 26, 1998. Petitioner

remained a fugitive during this time period. He was re-arrested and placed in custody on, or about, April 2, 2001. Thereafter, Petitioner contacted counsel to evaluate his case. A discovery of a clear error in the sentencing process resulted in a sentence that was in excess of that which was authorized by law. Since the § 2255 could not be filed, though one was filed in an attempt to obtain relief, the § 2241 would be the only alternative remedy for which Petitioner could avail himself under the theory of the "safety hatch." Clearly a § 2255 is inadequate and ineffective to test the legality of the sentence that was imposed. Petitioner was not in custody at the time in which the 2255 should have been filed and, therefore, the sentence was not being executed at the time in which he was on fugitive status. Custody is required in order for a 2255 to proceed. 28 U.S.C. § 2255. Even assuming *arguendo*, that custody is not required, a defendant can avail himself of the 2241 if he can prove that the 2255 is inadequate or ineffective to test the legality of the conviction. In this case, the 2255 was time barred in light of the Petitioner's fugitive status and, therefore, is inadequate to test the legality of his sentence. To keep the Petitioner from filing a 2241, and having relief determined on the merits of the complaint, deprives him of his due process rights and keeps him in prison beyond the scope of the requirements of a legal sentence, in violation of his Fifth and Sixth Amendment rights to due process, and to be free of cruel and unusual punishment through the deprivation of his liberty in violation of his Eighth amendment rights.

In Ortega-Rodriguez v. United States, 507 U.S. 234; 113 S.Ct. 1199 (1993), this Honorable Court discussed the fugitive dismissal rule. This rule generally applies where an appeal is dismissed, or a sentence is imposed, while a defendant is on fugitive status. In Ortega-Rodriguez, the Petitioner and co-defendants were convicted of possession with intent to distribute, and conspiring to possess with intent to distribute, cocaine. Petitioner Rodriguez failed to appear at sentencing but the district court sentenced him *in absentia* to 19 years, 7 months, followed by five years of supervised release. Subsequently, the Petitioner was arrested and sentenced to 21 months followed by three years of supervised release for the fugitive conviction. Rodriguez filed a motion for a judgment of acquittal and to vacate and resentence on the cocaine conviction. The district court denied the motion for judgment of acquittal, but granted the other motion and imposed a new sentence. Rodriguez filed a timely notice for review, in which the government filed a motion to dismiss on the fugitive dismissal rule. The court granted the government's motion, but the Supreme Court vacated the order and remanded. On remand, the court denied the motion to dismiss and reversed because there was insufficient evidence. The Eleventh Circuit found that the government would not suffer any undue burden if the appeal were granted, and that there would not be any potential interference with the appellate process.

By analogy, this same condition would apply to Petitioner Coley's case. There is no burden suffered by the government for granting 2241 relief and there

would not be any interference with the judicial processes that are available to the Petitioner in determining the legality of his sentence.

Ortega-Rodriguez, held that, under normal circumstances, a fugitive's appeal must be dismissed unless the defendant can show (1) granting the appeal is not likely to result in an undue burden on the government and (2) the defendant's flight has not resulted in, nor will not result in, significant interference with the operation of the judicial process in either the district court or the appellate court. When examining this test, the court should consider the availability of evidence and witnesses in the event of remand for new trial, as well as any proof that may no longer be available and overburdens the government in defending against the allegations. In the instant case, Petitioner Coley's circumstances do not overburden the government or deprive them of any relevant evidence that would limit their ability to defend against the question presented. There is no undue burden to the government, and there is no interference with judicial process of either the district court that must make the decision on the issue or the Court of Appeals. Every Federal Court is familiar with the Federal Sentencing Guidelines. Whether the District that sentenced the Petitioner is involved or not, Petitioner's rights can be addressed through any Federal District Court in the United States via 2255 or 2241. The guidelines are judicially universal in their application. Due to clear error in Petitioner's case, and the sentence that was imposed, overturning the sentence and resentencing of Petitioner can be done in any jurisdiction. (11th Circuit

or 5th). Petitioner received a 2-point sentencing increase that was not applicable by law. Therefore, Petitioner's fugitive status should not be a bar to relief, pursuant to 2241 considerations. Since a 2255 is time barred, the gate keeping effect of the 2241 prevails in which to give Petitioner the relief requested. If Petitioner cannot avail himself of a 2241, what recourse is there for a miscarriage of justice? Serving a longer sentence than is legally applicable, regardless of the time bar or fugitive status requires relief to avoid an unconstitutional result. Denying a 2255 as time barred, and then denying the 2241 because the court said the Petitioner did not show the 2255 was inadequate or ineffective, is a catch 22 result, creating no avenue for relief and causing Petitioner to serve an illegal sentence, one which constitutes cruel and unusual punishment without due process of law. The 2255 is inadequate based on the Eleventh Circuit Opinion, due to the time bar which occurred while Petitioner was on fugitive status and not in custody, or aware of the sentencing error.

Clearly the question turns on whether a person should be deprived of liberty, even though they were not charged, and convicted, in a court of law, by remaining in jail beyond the scope of what legally should be the sentence if the error had not occurred.

There is Supreme Court case law that says that fugitive status can cost you procedural consequences, resulting in a deprivation of a Constitutional right. *See* Ortega-Rodriquez v. United States, *supra*; and Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158 (1955). However, the issue presented to the Supreme Court in these cases

was not similar to what is being asserted here. Significantly, Coley attempted to file a § 2255, but it was determined to be time barred. The time bar was a result of his fugitive status. However, because of the relationship between the 2255 and the 2241, procedurally and in content, there is no reason to believe that the gate keeping provision of the 2241 cannot be used to provide the relief requested. To hold otherwise would place the Petitioner in custody without due process of law. This is not opening the floodgates for all defendants to come forward and state they have been deprived of their due process rights simply because they could not meet the deadline of the 2255. The limitations are clear in the instant case, in that the number of similarly sentenced fugitives is as limited as would be the type of legal errors Petitioner's case represents.

A fugitive, without being charged with that status, and convicted, should not be held in custody longer than the original sentence requires by law. Thus, the 2241 falls within that exception circle, wherein a person who would be incarcerated beyond the legal parameters of the law may avail himself of such relief. A person who could not have effectively raised the claim of innocence at an earlier proceeding, and had no access to judicial review, is entitled to seek *habeas corpus* relief, pursuant to 28 U.S.C. § 2241. *See* Triestman v. United States, 124 F.3d 361 (1997).

A. Petitioner's Claim of Error

The district court's findings at sentencing, as to the drug quantity, were 5 to 15 kilograms of cocaine, which should have resulted in a base offense level of Thirty-Two (32). *See* U.S.S.G. § 2D1.1(c)(4). With a Criminal History Category of One (I), the applicable sentencing range was 121-151 months. A two-point upward departure was added to make the sentencing range level 34 with 151-188 months incarceration. The sentencing court, however, erroneously sentenced Petitioner at level 36, 188-235 months, due to an oversight in the bases offense level when the drug quantity finding was made.

The District Court specifically referenced that the 2-point upward adjustment was applicable for role in the offense, pursuant to Application Note 2 to U.S.S.G. § 3B1.1. [Sentencing Transcript pg. 66]. The problem with the position of the District Court was that this Application Note, which gave rise to the two additional points for role, did not become effective until November 1, 1993, (*see* U.S.S.G. Amendment 500), which was over five years after the date the conspiracy ended. This resulted in a sentence under guideline level 36, instead of the correct level 32 when coupled with the quantity base offense level.

As the punishment in this case, by way of the use of the departure provisions of Application Note 2 to U.S.S.G. § 3B1.1, was significantly more severe than what it would have been under the guidelines in effect at the time of the offense, an *ex post facto* violation existed when Petitioner was sentenced. Petitioner's

sentence should have been within the range of 121-151 months, level 32. The Petitioner did not receive a correct sentence, counsel never objected or appealed the issue, and Petitioner was a fugitive when his 2255 would have been due on a claim of ineffective assistance of counsel. Therefore, by not being in custody to file a 2255, and being time barred, Petitioner's only remedy was, and is, a 2241.

B. Brief history surrounding the application of Habeas Corpus Petitions

Habeas relief, pursuant to 28 U.S.C. § 2255, is afforded when the conviction, or sentence, is defective by reason of an error that is neither jurisdictional, nor Constitutional, but, nonetheless, is fundamental. See United States v. Estrada, 849 F.2d 1304 (10th Cir. 1988), Larson v. United States, 833 F.2d 758 (8th Cir. 1987), and United States v. Fazzio, 706 F.2d 1115 (11th Cir. 1983). "Ordinarily, a defendant is to be sentenced according to the version of the Sentencing Guidelines in effect at the time of sentencing." *See* U.S.S.G. § 1B1.11(a). However, if the use of said version of the Guidelines would violate the *ex post facto* clause of the Constitution, the Sentencing Guidelines in effect at the time the offense of conviction was committed, are to be used. *See* U.S.S.G. § 1B1.11(b)(1). An *ex post facto* problem arises if the version of the Guidelines in effect at the time of sentencing makes more onerous the punishment for crimes committed before its enactment. Miller v. Florida, 482 U.S. 423, 435, 107 S.Ct. 2446, 2453-54 (1987) (internal quotes and citation omitted). *See also*

United States v. Domino, 62 F.3d 716 (5th Cir. 1995) (a sentence that is increased pursuant to an amendment to the guidelines effective after the offense was committed, violates the *ex post facto* clause).

The United States Constitution and laws authorize federal habeas corpus for both State and Federal prisoners. *See* United States v. Domino, 62 F.3d 716 (5th Cir. 1995) (federal habeas corpus used to challenge incarceration or procedures which are contrary to statute or Constitution). Rules regarding procedure for the application in the United States District Court for relief, pursuant to 28 U.S.C. § 2241, are by a person in custody pursuant to a judgment of a federal court, for determination if such custody is in violation of Constitutional laws, or treaty, of the United States. Ali v. Gibson, 572 F.2d 971 (3rd Cir. 1978).

Petitioner Coley should not be deprived of a review on the merits of his complaint that actually places him in custody for a longer term of imprisonment than would be warranted by fact or by law, resulting in a miscarriage of justice and a violation of his Constitutional rights. If the court uses Petitioner's fugitive status to ignore a legal issue of Constitutional proportions, then Petitioner is being punished for that fugitive status without being charged, and convicted, further violating his due process rights.

The writ of habeas corpus under § 2241 shall be extended to a prisoner if (1) he is in custody under or by color of authority of the United States, or is committed for trial before some court thereof; (2) he is in custody for an act done or omitted in pursuance to

an act of Congress or order of process, judgment, or decree of the court or judge of the United States; (3) he is in custody in violation of Constitutional laws or treaties of the United States; (4) he being in a system of foreign state or domicile therein and is in custody for an act done or omitted under any alleged right, title or authority, privilege, protection or exemption claimed under the commission, order, or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon a law of nations; or (5) it is necessary to bring him into court to testify for a trial. Swan v. Pressley, 430 U.S. 372, 97 S.Ct. 1224.

The Judiciary Act of 1789, Chapter 20, Sections 1 and 14, empowered federal courts in the district in which a prisoner was confined to issue a writ of habeas corpus if the prisoner was "in custody" under or by color of authority of the United States. *See* McClesky v. Zant, 499 U.S. 467, 477-78, 111 S. Ct. 1454 (1991). In 1867, a writ was made available to any federal prisoner restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. *See* Act of February 5, 1867, Chapter 28, §§ 1 and 14, *stat.* 385, *see* Kaufman v. United States, 394 U.S. §§ 217, 89 S.Ct. 1068 (1969). Today federal courts continue to retain jurisdiction to entertain habeas petitions from federal prisoners "in custody in violation of Constitutional laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

In 1948, by enacting 2255, which challenges collateral attacks by federal prisoners to the sentencing court (rather than to the court of the district of confinement) so that they can be addressed more

efficiently, Congress restricted (but did not eliminate) the right of federal prisoners to proceed under 2241(c)(3). *See generally,* United States v. Hayman, 342 U.S. 205 (1952) (detail and the history and purpose of the 2255). Section 2255 is not intended to eliminate the collateral rights of federal detainees in any way. It was simply designed to serve as a convenient substitute for judicial habeas corpus remedy.

Section 2255, as originally enacted, and as amended by the AEDPA, contains an explicit exception to the general rule that a federal prisoner must use 2255 instead of seeking a writ of habeas corpus under 2241 "an application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief unless it also appears the remedy by motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255. *See* Triestman v. United States, 124 F.3d 361 (2nd Cir. 1997). Coley filed a 2255 which was dismissed as time barred. The rule does not say Petitioner has no further habeas recourse.

Where a 2255 is inadequate or ineffective to test the legality of the prisoner's detention, such remedy may be found in 28 U.S.C. § 2241. *See* Sanders v. United States, 373 U.S. 1, 13-14, 83 S. Ct. 1068 (1963). Here the court considered whether to apply a strict *res judicata* rule to govern second and successive 2255 petitions and concluded that even assuming the Constitutionality of incorporated *res judicata* in 2255

motions, such a provision would probably prove to be completely ineffectual, in light of the further provision in this section that habeas corpus remains available to a federal prisoner if the remedy by motion is "inadequate or ineffective." [Emphasis added]. A prisoner barred by *res judicata* would seem as a consequence to have an "inadequate or ineffective" remedy under 2255 and, thus, be entitled to proceed in federal habeas corpus. *See* Mead v. Parker, 464 F.2d 1108, 1111 (9th Cir. 1972) (finding that "the remedy by motion under 2255, assuming that it exists (in a case in which prisoners are seeking injunctive relief in the form of access to legal materials) is 'inadequate' and perhaps ineffective, as well, since the sentencing court would not have had jurisdiction over the warden whose actions were being challenged. We think a remedy by motion can be inadequate, or ineffective, to test the legality of...detention only if it can be shown that some limitation of scope or procedure would prevent a § 2255 proceeding from affording the prisoner a full hearing and adjudication of his claim of wrongful detention." *See* Sanders, 373 U.S. at 14-15 and Parker at 1111. [Emphasis added]. The terms inadequate and ineffective must mean something or Congress would not have enacted it in 1948, and reaffirmed it in the AEDPA. *See* National Union Fire Insurance Company v. City Savings, 28 F.3d 376, 389 (3rd Cir. 1994) (in construing a statute, we are bound to give effect, if possible, to every word Congress used). *See* Reiter v. Sonotone Corporation, 442 U.S. 330, 99 S. Ct. 2326 (1979)(and without good reason, we will not assume the portion of a statute is superfluous, void, or

insignificant). *See* Triestman, *supra,* at 376-77. Serious Eighth Amendment and due process questions arise with respect to the AEDPA if courts were to conclude that, by amending 2255, Congress denied prisoners the right to collateral review in their cases. Where no other avenue of judicial review is available for a party who claims that he or she is factually, or legally, innocent as a result of a previously unavailable statutory interpretation, he/she would be faced with a thorny Constitutional issue. In Re: Dorsainvil, 119 F.3d 245 at 248 (3rd Cir. 1997). *See also* Pottinger v. City of Miami, 810 F.Supp. 1551, 1565 (S.D. Fl. 1992) (finding that a person "may not be convicted under the Eighth Amendment" of innocent conduct).

C. Deprivation of Constitutional Rights

Petitioner is in the custody of federal authorities and has exhausted all possible administrative appeals and/or any further administrative appeals would prove futile and is being held on a sentence that violates his Fifth, Sixth, and Eighth Amendment rights.

D. Inadequacy of the 2255 Creates 2241 Jurisdiction

A federal conviction or sentence is attackable in a 28 U.S.C. § 2241 proceeding to the same extent that a federal conviction or sentence can be attacked in a proceeding under 28 U.S.C. § 2255. This means that in § 2241 proceedings, relief from a federal conviction, or sentence, may be granted on the following grounds:

1. The conviction is void for lack of personal or subject matter jurisdiction. *See* United States v. Addonizio, 442 U.S. 178, 99 S.Ct. 2235 (1979) (habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction).
2. The conviction or sentence is unconstitutional and results from the denial of a federal Constitutional right or arrest on an unconstitutional statute. [Emphasis added]. *See* Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964 (1942) (habeas corpus extends to cases where the conviction has been in disregard of an accused's Constitutional rights).
3. The sentence is in excess of the lawful maximum. *See* Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588 (1947) (where Constitutionality of federal statute under which conviction was had, is attacked, habeas relief has sometimes been granted). Here Petitioner Coley is subjected to increased incarceration on a guideline provision founded in a statute, 18 U.S.C. § 3553.
4. The conviction, or sentence, is for some other reason, fundamentally, or egregiously, defective, even though the error is not jurisdictional or Constitutional. *See* United States v. Addonizio, *supra*, (unconstitutional error

> does not provide basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice). *See also* Davis v. United States, 417 U.S. 333, 94 S.Ct. 2298 (1974) (non-jurisdictional and non-Constitutional claim herein that a claim that a retroactive change in law rendering the Petitioner's conduct non-criminal may be asserted in federal habeas corpus proceedings attacking federal conviction).

Even though a 2255 is generally exclusive for testing the validity of a judgment and sentence, 2241 remedy is available where the 2255 is inadequate, or ineffective, in testing the merits of the complaint. The 2255's inadequate or ineffective provisio, also called the "safety hatch," was retained by the AEDPA. If, in any particular case, the 2255, as amended by the AEDPA, does not provide an adequate substitute for habeas corpus, the prisoner can seek 2241 habeas relief. In Re: Davenport, 147 F.3d 605 (7th Cir. 1998), and Triestman v. United States, 124 F.3d 361 (2nd Cir. 1997).

Under the inadequate or ineffective provisio of the 2255, a prisoner can take advantage of the gate keeping provision of the 2241. The inadequate or ineffective provisio does not refer solely to practical limitations on the petitioner's ability to obtain 2255 relief, but also includes legal inadequacies.

A § 2241 petition that seeks to challenge a federal sentence or conviction, effectively acting as a § 2255 motion, may only be entertained when the Petitioner establishes that the remedy provided for under § 2255 is inadequate or ineffective. *See* United States v. Hayman, 342 U.S. 205, 72 S. Ct. 263 (1952). Clearly the 2255 is inadequate and ineffective to challenge the question of law being presented. Nothing in the Constitution requires that a defendant be punished for a claim of innocence or an error that is so plain and blatant that he serves more time in custody than he is legally responsible for, even if his procedural default in failing to timely file a § 2255 petition is based on his own fugitive status.

Though Petitioner bears the burden of demonstrating a § 2255 remedy is inadequate and ineffective, Petitioner has made that showing. Circuit courts have found that a defendant may invoke "the savings clause" exception when the Constitution demands it. In this case, the Petitioner will be deprived of his right to be free of cruel and unusual punishment under the Eighth Amendment to the United States Constitution. A violation of the Petitioner's Fifth and Sixth Amendment rights, and a miscarriage of justice, occurs if he serves more time in custody than is warranted for the crime he was sentenced to, on an obvious and clear error of legal and Constitutional proportions. *See* In Re: Davenport, *supra,* (noting that § 2241 relief may be available to challenge a conviction or sentence in order that the prisoner "cannot complain that the limitations in § 2255 suspended whatever Constitutional right he might have had under the

suspension clause, or conceivably, under the due process clause, to be allowed to seek Habeas Corpus"). A claim of actual innocence permits a Petitioner, under certain circumstances, to utilize § 2241 as a means of circumventing 2255 restrictions on filing a second or successive Habeas petition. *See* Cooper v. United States, 199 F.3d 898, 901 (7th Cir. 1999) and *also* Charles v. Chandler, 180 F.3d 753, 755 (6th Cir. 1999) (per curiam).

Level 34 was not applicable to Petitioner's case, pursuant to the sentencing guidelines for 5-15 kilos of cocaine. He was not in custody and could not avail himself of a timely 2255, therefore, to avoid serving more time in custody than the law requires, a 2241 must be permitted in order to avoid the deprivation of liberty afforded all citizens under the United States Constitution. A 2241 can be used to affect the Petitioner's liberty interest in place of a 2255, despite Petitioner's fugitive status at the time the 2255 would have been timely. Because a 2241 protects similar rights as a 2255, Petitioner can avail himself of the 2241 procedures to correct a deprivation of his Constitutional rights. The similarity of both the provisions, and the preservation by Congress of both provisions, indicate Congressional intent to retain 2241 relief where the 2255 is inadequate. Petitioner was not in custody to file a 2255, a requirement of such a provision. His fugitive status should not waive his liberty interests. There are limitations to the deprivation of Constitutional rights waived while a fugitive, however, these limitations do not apply to 2241 relief.

This Honorable Court should remand the Petitioner's 2241 for the relief requested as the 2241 protects similar rights to a 2255 when the 2255 is inadequate to redress clear liberty and due process violations. Petitioner's lack of custody at the time his 2255 was due, and the error in sentencing, allow Petitioner to effectuate relief to avoid a deprivation of freedom. The government is not prejudiced by such action. This Honorable Court must determine if the 2241 can be used to protect Petitioner's Constitutional rights due to its similar provisions of the 2255, and the only reason Petitioner could not avail himself of the 2255, was due to his fugitive status.

CONCLUSION

The petitioner, TERRY COLEY, respectfully requests that this Court issue a Writ of Certiorari to review the important questions presented herein.

Respectfully submitted this, the 19th day of September, 2006.

Submitted by,
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United States Court of Appeals
Fifth Circuit

No. 05-41180
Conference Calendar

TERRY COLEY,
Petitioner-Appellant,

versus

HARLEY G. LAPPIN; WARDEN DAVID JUSTICE,
Respondents-Appellees.

[Entered: June 21, 2006]

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:04-CV-108

Before STEWART, DENNIS, and OWEN,
Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Terry Coley was convicted of conspiracy to possess drugs with intent to distribute and possession of drugs with intent to distribute and sentenced to serve 188 months in prison and a five-year term of supervised release. He filed a 28 U.S.C. § 2241 habeas corpus petition to challenge this conviction and sentence, and he now appeals the district court's dismissal of his § 2241 petition. He argues that he should be permitted to pursue § 2241 relief in accordance with the savings clause of 28 U.S.C. § 2255 because his fugitive status prevented him from timely pursuing § 2255 relief. He also presents argument on the merits of his sentencing claims.

Coley has not shown that the district court erred in determining that his purported § 2241 petition was best construed as a § 2255 motion over which the district court lacked jurisdiction. See *Reyes-Requena v. United States*, 243 F.3d 893,904 (5th Cir. 2001); *Cox v. Warden, Fed. Det. Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990); *Solsona v. Warden*, F.C.I., 821 F.2d 1129, 1132 (5th Cir. 1987). Coley's contention that he should be permitted to proceed under § 2241 due to his prior status as a fugitive is unpersuasive. The judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

TERRY COLEY	§
VS.	§ **CIVIL ACTION NO. 5:04cv108**
F.C.I. WARDEN	§

[Entered: July 6, 2005]

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court referred the above-entitled and numbered civil action to United States Magistrate Judge Caroline M. Craven. The Magistrate Judge presented for consideration the Magistrate Judge's Report, containing proposed findings of fact and recommendations for disposition of this case. Petitioner filed objections to the Report.

This Court made a de novo review of Petitioner's objections and determined that they lack merit. This Court finds that the Magistrate Judge's findings and conclusions are correct, and adopts them as the Court's findings and conclusions. The Court therefore

ORDERS, ADJUDGES, and DECREES that Petitioner's petition (dkt. #1) and supplemental motion for writ of habeas corpus (dkt. #8) are denied and this action is **DISMISSED WITH PREJUDICE** for lack of jurisdiction and **DISMISSED WITHOUT PREJUDICE** regarding all other issues; and

ORDERS that all motions not previously ruled on are denied.

SIGNED this 6th day of July, 2005.

/s/ David Folsom
David Folsom
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

TERRY COLEY	§
VS.	§ **CIVIL ACTION NO. 5:04cv108**
F.C.I. WARDEN	§

[Entered: July 6, 2005]

FINAL JUDGMENT

This Court considered Petitioner's case, rendered the Court's decision by opinion issued this date, and **ORDERS** that this action is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction and **DISMISSED WITHOUT PREJUDICE** regarding all other issues.

SIGNED this 6th day of July, 2005.

/s/ David Folsom
David Folsom
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

TERRY COLEY	§
VS.	§ CIVIL ACTION NO. 5:04cv108
F.C.I. WARDEN	§

[Entered: May 11, 2005]

REPORT AND RECOMMENDATION OF UNITED STATE MAGISTRATE JUDGE

Petitioner Terry Coley, a prisoner confined at FCI Decatur, Georgia, brings this petition for a writ of habeas corpus challenging his conviction pursuant to 28 U.S.C. § 2241. The petition was referred for findings of fact, conclusions of law, and recommendations for disposition of the case.

Procedural Background

Terry Coley was convicted in the Northern District of Georgia, Houston Division, of conspiracy to possess with intent to distribute in violation of 21 U.S.C. 846 and possession with intent to distribute in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. Petitioner was sentenced to 188 months imprisonment on May 13, 1994.

Petitioner asserts that he was erroneously subjected to a higher base level offense than he should have been, that the court erred in subjecting him to an upward departure from the base level offense, and that

Petitioner received ineffective assistance of counsel. Petitioner previously raised these issues in a § 2255 motion in the Northern District of Georgia, Atlanta Division (*State Court Records*, Exhibit A at 6) on August 16, 2002 (*State Court Records*, Exhibit A at 1). That court dismissed the motion as barred by the statute of limitations. State *Court Records*, Exhibit B at 4.

Petitioner is now challenging his sentence pursuant to § 2241, as opposed to § 2255. Respondent filed a response asserting that Petitioner's application should be dismissed. Respondent asserts that a § 2241 proceeding is inappropriate for Petitioner's claims. Petitioner filed a reply asserting that he should be able to file a § 2241 proceeding because he is time-barred from filing a § 2255 motion.

Standards and Discussion

Disposition of the petition is governed by the Fifth Circuit's opinion in *Pack v. Yusuff*, 218 F.3d 448 (5th Cir. 2000). The Fifth Circuit noted that a § 2241 proceeding attacks the manner in which a sentence is carried out. *Id.* at 451. A § 2255 motion is the method to mount a collateral attack on a federal conviction. *Id.* "A petition for a writ of habeas corpus pursuant to 2241 is not a substitute for a motion under 2255." *Id.* at 452 (citations omitted). A § 2241 petition that seeks to challenge the validity of a federal sentence must either be dismissed or construed as a § 2255 motion. *Id.*

The Court noted that § 2255 contains a "savings clause" that will permit a § 2241 petition to act as a § 2255 motion in rare cases where the petitioner shows

that the remedy under § 2255 is inadequate or ineffective. *Id.* The Court held that a § 2241 petition may not be used as a substitute for a § 2255 motion just because the § 2255 motion is time barred, like the present petition would be if it were construed as a § 2255 motion. *Id.* at 452-53. The Fifth Circuit also noted that other circuits have held that a defendant may invoke the "savings clause" exception "only when the Constitution demands it, or where otherwise Congress would violate the Suspension Clause by imposing a conviction or sentence without allowing for section 2241 relief." *Id.* at 453 (*citing In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)). The Fifth Circuit chose not to decide the precise scope of the "savings clause," but held that the petitioner in that case did not establish the inadequacy or ineffectiveness of the § 2255 remedy. *Id.*

In *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998), the court concluded that a federal prisoner should be permitted to seek habeas only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion. 147 F.3d at 611. The Court went on to specify the following qualifications: First, the change in the law has to be made retroactive by the Supreme Court; second, the change in the law must be one that eludes the permission in Section 2255 for successive motions and, third, the "change in law" is not to be equated to a difference between the law in the circuit in which the prisoner was sentenced and the circuit in which he is incarcerated. *Id.* at 611-12.

Petitioner has not even begun to satisfy the requirements specified in Davenport. Petitioner is not citing a change in law. In conclusion, Petitioner is attempting to impermissibly use a § 2241 petition as a substitute for a § 2255 motion. He is doing so because a § 2255 motion would be time barred. He has not otherwise shown that a § 2255 motion, if he had timely availed himself of that remedy, would have been inadequate or ineffective. Following the Fifth Circuit's lead in *Pack v. Yusuff*, the Court concludes that the Petitioner "may not avail himself of section 2241 relief in this case." 218 F.3d at 453. The petition should be dismissed with prejudice for lack of jurisdiction and dismissed without prejudice regarding all other issues. *Id.* at 454-55.

Recommendation

It is accordingly recommended that the petition and supplemental motion for writ of habeas corpus (dkt. #8) be dismissed with prejudice for lack of jurisdiction and dismissed without prejudice regarding all other issues.

Objections

If the parties file no objections to the United States magistrate judge's report, then the district judge can conclude that the findings of fact and conclusions of law in the Report are correct, adopt the report, and issue a final judgment according to the magistrate judge's recommendations. *Douglass v. United Servs.*

Auto. Ass'n, 79 F.3d 1415, 1418 (5th Cir. 1996); *Homan v. Comm'r of Soc. Sec. Admin.*, 84 F. Supp. 2d 814, 815 (E.D. Tex. 2000). Objections must be written, specific, and served and filed within ten days after being served with a copy of this report. *Douglass*, 79 F.3d at 1427-30; *Eddins v. Excelsior Indep. Sch. Dist.*, 88 F. Supp. 2d 695, 695 (E.D. Tex. 2000); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a)-(b) and 72(b). A party's failure to file written objections to the findings and recommendations contained in this Report within ten days after service shall bar that party from the following:

(1) *de novo* review by the district judge of those findings and recommendations (*Rodriguez v. Bowen*, 857 F.2d at 276-77 (5th Cir. 1988); *Eddins*, 88 F. Supp. 2d at 695; see also *Douglass*, 79 F.3d 1415); and

(2) appellate review, except on grounds of plain error, of unobjected-to proposed fact findings and legal conclusions accepted and adopted by the district court (*Meister v. Texas Adjutant General's Dep't*, 131 F.3d 1120, 1123 (5th Cir. 2001); *Eddins*, 88 F. Supp. 2d at 695; see also *Douglass*, 79 F.3d at 1430).

SIGNED this 11th day of May, 2005

/s/ Caroline M. Craven
Caroline M. Craven
UNITED STATES MAGISTRATE JUDGE

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.